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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-746

HONORABLE MORRIS E. LASKER,

UNITED STATES DISTRICT JUDGE FOR
THE SOUTHERN DISTRICT OF NEW YORK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MAX WILD
RUBIN WACHTEL BAUM & LEVIN
598 Madison Avenue
New York, N. Y. 10022

GREGORY J. PERRIN
30 Vesey Street
New York, N. Y. 10007

November 8, 1973

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, the Honorable Morris E. Lasker, United States District Judge for the Southern District of New York, respectfully prays that a writ of certiorari issue to review that part of the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in this proceeding of June 11, 1973, which constituted a writ of mandamus directing petitioner to reinstate the separate indictments of Donald F. Carone, Raymond F. Carr and Albert Ferguson, which he had

dismissed on December 5, 1972 because of the respondent's violation of the Second Circuit Rules Regarding Prompt Disposition of Criminal Cases (the "Prompt Disposition Rules").*

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 481 F.2d 229. Petitioner's opinion, not officially reported, is reproduced in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on June 11, 1973. A timely petition for rehearing with suggestion of rehearing *in banc* was denied on August 10, 1973, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §§1254(1) & 1651(a).

QUESTIONS PRESENTED

1. Whether the Court of Appeals had the power to issue a writ of mandamus, since petitioner acted within his discretion.

2. Whether the Court of Appeals exceeded its jurisdiction, or, alternatively, abused its discretion by precluding petitioner from deciding a non-reviewable discretionary matter, to wit, whether the indictments should have been dismissed under Rule 48(b), F. R. Crim. P.

3. Assuming, *arguendo,* that the Court of Appeals had the power to issue a writ of mandamus, whether it abused

* This petition is prosecuted on Judge Lasker's behalf by Max Wild, Esq. of Rubin Wachtel Baum & Levin representing Mr. Carone, and Gregory J. Perrin, Esq., representing Messrs. Carr and Ferguson.

its discretion by greatly expanding the scope of mandamus in criminal cases, making it a substitute for appeal, in a case where there was no need for guidance since the relevant law had changed.

4. Whether the Court of Appeals exceeded its power in setting aside a factual finding by petitioner.

5. Whether the Court of Appeals improperly made factual findings on disputed issues without remanding for a hearing.

6. Whether the Court of Appeals, in holding that petitioner could not properly dismiss the indictments under Rule 48(b), F. R. Crim. P., although petitioner neither grounded his decision nor held a hearing thereon, erroneously rejected as "insubstantial" undisputed showings by defendants that they had been severely prejudiced by the government's intentional and bad faith delay of their respective trials.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

United States Code, Title 28:

§1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

United States Code, Title 18:

§3731 (as applicable to indictments filed before January 1, 1971) provides in relevant part:

§3731. Appeal by United States

* * * *

An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.

§3731 (as applicable to indictments filed after January 1, 1971) provides in relevant part:

§3731. Appeal by United States

In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

The Second Circuit Rules Regarding Prompt Disposition of Criminal Cases provide in relevant part (rescinded March 31, 1973):

4. In all cases the government must be ready for trial within six months from the date of the arrest,

service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest. If the government is not ready for trial within such time, or within the periods as extended by the district court for good cause under rule 5, and if the defendant is charged only with non-capital offenses, then, upon application of the defendant or upon motion of the district court, after opportunity for argument, the charge shall be dismissed.

5. In computing the time within which the government should be ready for trial under rules 3 and 4, the following periods should be excluded:

* * * *

(d) The period of delay resulting from the absence or unavailability of the defendant. A defendant should be considered absent whenever his location is unknown and in addition he is attempting to avoid apprehension or prosecution or his location cannot be determined by due diligence. A defendant should be considered unavailable whenever his location is known but his presence for trial cannot be obtained by due diligence.

(e) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and there is good cause for not granting a severance. In all other cases the defendant should be granted a severance so that he may be tried within the time limits applicable to his case.

The Plan for Achieving Prompt Disposition of Criminal Cases (promulgated pursuant to Rule 50(b), F. R. Crim. P., and effective April 1, 1973) provides in relevant part:

4. *All Cases: Trial Readiness and Effect of Non-Compliance.*

In all cases the government must be ready for trial within six months from the date of the arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest. If the government is not ready for trial within such time, and if the defendant is charged only with non-capital offenses, the defendant may move in writing, on at least ten days' notice to the government, for dismissal of the indictment. Any such motion shall be decided with utmost promptness. If it should appear that sufficient grounds existed for tolling any portion of the six-months period under one or more of the exceptions in Rule 5, the motion shall be denied, whether or not the government has previously requested a continuance. Otherwise the court shall enter an order dismissing the indictment with prejudice unless the court finds that the government's neglect is excusable, in which event the dismissal shall not be effective if the government is ready to proceed to trial within ten days.

5. *Excluded Periods.*

In computing the time within which the government should be ready for trial under Rules 3 and 4, the following periods should be excluded:

* * * *

(d) The period of delay resulting from the absence or unavailability of the defendant. A defendant should be considered absent whenever his location is unknown. A defendant should be

considered unavailable whenever his location is known but his presence for trial cannot be obtained by due diligence.

(e) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and there is good cause for not granting a severance. In all other cases the defendant should be granted a severance so that he may be tried within the time limits applicable to his case.

Rule 48(b). F. R. Crim. P., provides:

Rule 48. Dismissal.

* * * *

(b) By Court. If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

STATEMENT OF THE CASE

Each of the indictments was handed up on February 25, 1970. In substantially identical language, each charged in one count that defendant Mintz and Morton Penn, who were partners in the business of representing manufacturers selling to the Army and Air Force Exchange Service (the "PX"), conspired to defraud the United States by paying kickbacks to various PX buyers, including defendants herein, to obtain favored treatment for their clients, in violation of the general conspiracy

statute*. 18 U.S.C. 371. At or prior to arraignment each defendant was offered immunity to incriminate other PX buyers.

Promptly after their arraignments each of the appellees moved to dismiss his indictment on the grounds that it failed to charge a crime, since the PX was neither the United States nor an agency thereof and consequently the United States could not have been defrauded by the alleged commercial bribery of PX employees, and because it was vague and indefinite. Additionally, defendants Carr and Ferguson sought dismissal on the ground of prejudicial pre-indictment delay. On June 1, 1970, said motions were denied. Messrs. Carr and Ferguson were granted leave to renew their pre-indictment delay motion before the trial court.

Apart from furnishing appellees with bills of particulars on July 15, 1970, which admitted, in substance, that the PX had not suffered any financial loss from the alleged conspiracy to defraud, the government took no step to prosecute these actions, which had been marked off the calendar from the time of the argument of the motions in April, 1970.

Although denied meaningful discovery counsel for the defendants diligently prepared for trial. The defendants had advised their attorneys that an analysis of the PX purchasing records would negate the alleged commercial bribery by establishing that they had not favored sellers represented by Penn and Mintz and that the defendants had purchased only the highest quality merchandise at the lowest possible prices from a broad range of manufacturers. Accordingly, with the full knowledge of the government, defendants served pretrial subpoenas upon

* Penn had been given immunity and was named only as a co-conspirator. He will be the government's key witness.

the PX requiring the production of all relevant records. However, the records of the PX pertaining to the purchases made by the defendants had not been retained apparently due to the expiration of such a long period of time.* Further, the PX was unable to identify the manufacturers represented by Penn and Mintz.

On January 5, 1971 the Circuit Council promulgated the Second Circuit Rules Regarding Prompt Disposition of Criminal Cases, specifically making them applicable to all pending cases, such as these. The effective date of the Rules was postponed for six months to July 5, 1971, to allow "sufficient time for the United States Attorneys to determine which cases should be reached for trial and which cases should be discontinued. . . ." Statement of Circuit Council Accompanying the Rules.

Still the government did nothing to prosecute these cases. Instead, during the summer of 1971, it instituted a number of civil actions against the defendants and other PX buyers not under indictment, seeking to recover the improper payments supposedly made to them by Penn and Mintz under the scheme alleged in these indictments. These cases were commenced in the district courts located in New Jersey, Florida, Texas and Hawaii.

The defendants Carr and Ferguson continue to be employees of the PX. However, they have been under a cloud as a result of the indictments and promotional and other opportunities have been seriously affected. The defendant Carone was forced out of business as a result of the filing of the indictment and later precluded from

* The indictments charged conspiracies beginning in Europe in 1961 and ending ten years later with their filing in 1970. The alleged overt acts took place three to four years before the indictments were filed.

taking a real estate brokers examination due to the pending charge.

Thereafter, the government, without notice to any of the defendants or approval of the petitioner, caused the cases to be reported as Rule 5(e) exceptions to the six month trial requirement of the Prompt Disposition Rules on the theory that Mintz, who for many years prior to the return of the indictment had resided in Europe, was a "fugitive". The government had been in contact with Mintz both before and after the indictments. Moreover, many months after the indictment Mintz was located and interviewed in Spain on behalf of the defendants.

In March 1972, petitioner held an *ex parte* conference with government counsel to inquire as to the status of these cases and was advised of the above reason for the government's classification of these cases as Rule 5(e) exceptions. He directed that the government apprise counsel for the defendants of the status of the cases and the reason for the government's failure to have moved the cases for trial. By letter dated March 10, 1972, the government so advised defense counsel.

Promptly after receipt of said letters, each defendant moved for the dismissal of the indictment against him. The grounds of the motions insofar as Messrs. Carr, Ferguson and Carone were concerned, were that the government's delay violated their rights under the Prompt Disposition Rules as well as under Rule 48 of the Federal Rules of Criminal Procedure and the Sixth Amendment of the United States Constitution. Defendants urged that the government's delay was purposeful, because it recognized, as a pretrial deposition taken of Penn in one of the above civil actions made clear, that a conviction could not be obtained on Penn's uncorroborated testimony. The government attorney in charge of the civil actions advised

defendant Carone's counsel at Penn's deposition that it was delaying the criminal cases in the hope of locating and extraditing Mintz, upon whom it intended to confer immunity. Although the prosecution averred before petitioner that the government did not intend to immunize Mintz, it did not deny the above statement by the other government counsel.

On December 5, 1972, petitioner filed an opinion and order in which he dismissed each of the indictments. Petitioner grounded his ruling exclusively on the Prompt Disposition Rules and left open the issue of whether the defendants were also entitled to dismissal under Rule 48.

The government thereafter prosecuted an appeal to the United States Court of Appeals for the Second Circuit. The government neglected to call to that court's attention its waiver of oral argument before petitioner and argued that it had been denied a hearing. Further, it neglected to call to that court's attention the then recent decision in *United States* v. *DiStefano,* 464 F.2d 845, (2d. Cir. 1972). *DiStefano,* 464 F.2d *supra* at 846-49 held unanimously under the appeal statute applicable to these indictments, (18 U.S.C. 3731) these dismissals were non-appealable. In *DiStefano,* then Chief Judge Friendly, with Circuit Judge Mulligan concurring, further held over the dissent of former Chief Judge Lumbard, that under this Court's decision in *Will* v. *United States,* 389 U.S. 90 (1967), mandamus would not lie either. 464 F.2d at 849-51.

At oral argument the panel below, consisting of Senior Circuit Judge Lumbard, Circuit Judge Timbers and Senior District Judge Wyzanski, sitting by designation, suggested to the government that it file a petition to the panel for a writ of mandamus directing petitioner to reinstate indictments.

Defendants opposed mandamus on the grounds that it was unauthorized in criminal cases, except where the district judge had acted without jurisdiction and that to grant such relief would conflict with the well settled law contained in such cases as *Will, supra* and *DiStefano, supra.* Defendants further urged that the extension of the law of mandamus was unnecessary since (1) the new appeal statute gave the government a right to appeal in substantially all pending cases and (2) the relevant provisions of the Prompt Disposition Rules had been changed.

Throughout the proceeding before petitioner and before the Court below the government at no time ever stated that it was ready to try any of the cases against these defendants.

By decision dated June 11, 1973, the court below held that it was without jurisdiction to hear the governments appeal, but that it would grant it mandamus.

Petitioner's timely application for rehearing with suggestion for rehearing *in banc* additionally urged that the panel decision of June 11, 1973, improperly rejected factual findings of petitioner and made its own findings on disputed issues, without remanding for a hearing.

On August 10, 1973 petitioner's timely application for rehearing with suggestion for rehearing *in banc* was denied. On September 12, 1973 the certified record in these cases was forwarded by the clerk of the court below to this Court.

This Court has jurisdiction pursuant to 28 U.S.C. §§1254(1) and 1651. Petitioner is required to file this petition within ninety days from the date of the judgment of the Second Circuit denying his petition for rehearing.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN WILL v. UNITED STATES, 389 U.S. 90 (1967) AND WITH DECISIONS OF THE SECOND CIRCUIT AND OTHER CIRCUITS HOLDING THAT IN CRIMINAL CASES MANDAMUS LIES ONLY WHERE A DISTRICT JUDGE HAS EXCEEDED HIS JURISDICTION.

The court below specifically grounded its decision, not upon any breach of petitioner's conceded discretionary powers, but upon its undefined "supervisory authority". 481 F.2d at 235.* This holding flies in the face of *Will* v. *United States,* 389 U.S. 90 (1967) and squarely conflicts with the Second Circuit's decision in *United States* v. *United States* v. *DiStefano,* 464 F.2d 845 (2d Cir. 1972) and other decisions in the Second and other circuits. The well-settled law until this case was that in criminal cases mandamus was limited to those rare instances where a district judge had exceeded his lawful powers.

(a) *Will, supra,* is the definitive decision on the scope of mandamus in criminal cases. This Court there reversed a writ of mandamus granted on the government's application, stating that

> "it is clear that only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy." 389 U.S. at 95.

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* The court below in footnote 2 offered as an alternative basis of decision the contention that under its interpretation of the Prompt Disposition Rules the six month period had not run and, therefore, petitioner lacked the power to dismiss the indictment. 481 F.2d at 235. This view is akin to stating "that a judge has no 'power' to enter an erroneous order", which this Court rejected as a "semantic fallacy [that] would undermine the settled limitations upon the power of an appellate court to review interlocutory orders." *Will, supra,* 389 U.S. at 98, fn.6.

This Court expressed particular concern over the fact that the underlying case was criminal in nature, distinguishing *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249 (1957).

> "and the other decisions of this Court approving the use of mandamus as a means of policing compliance with the procedural rules . . . [on the ground that they were] *civil cases.*" 389 U.S. 100 fn. 10 (emphasis added).

This Court there held that Congress had strictly limited the government's right to appeal in criminal cases (former 18 U.S.C. §3731) "to narrow categories of orders terminating the prosecution" (389 U.S. at 96).* This Court then stated (389 U.S. at 97):

> "Nor is the case against permitting the writ to be used as a substitute for interlocutory appeal 'made less compelling . . . by the fact that the Government has no later right to appeal.' "

Judge Lumbard attempted to distinguish *Will* in this case (481 F.2d at 236) as he had in his dissent in *United States* v. *DiStefano,* 464 F.2d 845, 853 (2d Cir. 1972) on the ground that in *Will* there had not been a dismissal. However, Chief Judge Friendly, with Circuit Judge Mulligan concurring, rejected that attempted distinction stating (464 F.2d at 850):

> "While it is possible to find phrases in the *Will* opinion that might afford some basis for distinction, such an effort would ignore the decision's main thrust."

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* The court below recognized that former 18 U.S.C. §3731 did not permit the government to appeal when indictments had been dismissed under either Rule 48(b), F. R. Crim. P. or the Prompt Disposition Rules. 481 F.2d at 232.

b. *DiStefano, supra,* is indistinguishable from the instant case. It squarely conflicts with the instant decision. Additionally, the Second Circuit's recent decisions, both before and after its instant opinion, have specifically rejected the notion that supervisory mandamus may be used in a criminal case. *SEC* v. *Stewart,* 476 F.2d 755 (2d. Cir. 1973), *United States* v. *Griesa,* 481 F.2d 276 (2d Cir. 1973) and *Hilbert* v. *Dooling,* 476 F. 2d 355 (2d Cir. 1973). Indeed, the doctrine of supervisory mandamus applied below by Circuit Judges Lumbard and Timbers was rejected by Chief Judge Friendly and Circuit Judges Hays, Smith, Feinberg and Mulligan over the dissents of Circuit Judges Lumbard and Timbers.

The law of the Second Circuit, which except in this case, squares with *Will, supra,* should not be changed by the fact that two dissenters should find themselves on the same panel. Its decisions both before and after the instant decision are in irreconcilable conflict with the instant decision.

c. The decision of the court below to extend the scope of mandamus under its "supervisory authority over the district courts" (481 F.2d at 235) to correct what was at most a discretionary error conflicts with the decisions of at least three other circuits which have limited mandamus to jurisdictional excesses. *United States* v. *Hester,* 325 F.2d 654 (9th Cir. 1963); *Frost* v. *Yankwich,* 254 F.2d 633 (9th Cir. 1958), *cert. denied,* 355 U.S. 915 (1958); *Thornton* v. *Corcoran,* 407 F.2d 695 (D. C. Cir. 1969); *Johnston* v. *Marsh,* 227 F.2d 528 (3d Cir. 1955).

Hester, supra, is particularly close to the instant decision. There the Ninth Circuit denied the government's petition for a writ of mandamus to compel a district judge to reinstate an indictment he had dismissed for want of prosecution, stating (325 F.2d at 657):

> "A writ of mandamus directing a court to do some act is an extraordinary remedy and is properly issued only when the lower court clearly acts in excess of its jurisdiction, abuses its jurisdiction, or refuses to exercise it. * * * Rarely should a writ of mandamus be issued."

It is clear that the decision below stands in direct conflict with the settled law of this Court, at least three other circuits and the Second Circuit itself. Certiorari is necessary to resolve this conflict and prevent future unwarranted extensions of mandamus.

2. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING THE SCOPE OF THE WRIT OF MANDAMUS.

Mandamus is on its face an extraordinary writ limited, especially in criminal cases, to a "judicial 'usurpation of power' ". *Will, supra,* 389 U.S. at 95. During the first six months of 1973 there were four major decisions involving the scope of mandamus in the Second Circuit alone. *Hilbert* v. *Dooling; SEC* v. *Stewart; United States* v. *Griesa* and this case. The future importance of a precise delineation of the scope of mandamus is clear beyond question.

Unless this Court explicitly closes the technical gaps the court below contends were left open in *Will, supra,* future circuit judges will continue to seize upon them to use mandamus as a substitute for appeal in complete disregard of what Chief Judge Friendly has described as *Will's* "main thrust". *DiStefano, supra,* 464 F. 2d at 850.

This case presents the ideal vehicle for closing those supposed gaps. Here Circuit Judges Lumbard and Timbers obviously took advantage of the fact that they were on the same panel to reach out and create a new and expanded form of "supervisory mandamus", which their

brothers had rejected over their dissents in earlier cases. This Court should not permit the random panel selection process to result in distortions of the settled law when dissenters find themselves on the same panel.

The need for review in this case is made all the more compelling because mandamus was completely unnecessary.

First, under the new appeals statute (18 U.S.C. §3731 applicable to all indictments returned after January 1, 1971) the government has the right to appeal dismissals in substantially all pending cases.

Second, the decision below can provide little, if any, guidance. The Prompt Disposition Rules under which petitioner dismissed the indictments were rescinded less than three weeks after argument below. Moreover, as the court below knew, the new Plan For Achieving Prompt Disposition of Criminal Cases (the "District Plan") became effective two and a half months before it filed the instant opinion.* While the District Plan was intended to effect prompt disposition of criminal cases, it was so significantly different from the relevant provisions of the Prompt Disposition Rules as to deprive the decision below of any guidance value.** Moreover, any guidance which the Circuit Council might have wished to provide the

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* The District Plan, promulgated pursuant to Rule 50(b), F. R. Crim. P., became effective on April 1, 1973.

** The court below was concerned that the government not be "mouse-trapped" by a retroactive determination that its delay was unreasonable. 481 F.2d at 233. Accordingly, it interpreted the Prompt Disposition Rules so as to eliminate the need for a prior application for a continuance. This interpretation served no didactic function since the District Plan which had been effective for some two and one half months prior to the filing of the option specifically so provided.

district judges, could more appropriately have been made by modifying the Prompt Disposition Rules as was effectively accomplished by the District Plan.

Clearly, the decision below was an unnecessary and improper extension of the scope of mandamus which is bound to increase litigation around the country. The panel below set a dangerous precedent in arrogating to itself a right of review denied it by Congress in former 18 U.S.C. §3731.

3. THE COURT BELOW EXCEEDED ITS JURISDICTION BY PREVENTING PETITIONER FROM RULING ON A DISCRETIONARY MATTER WHICH IT HAD NO AUTHORITY TO REVIEW.

Defendants sought dismissal of their indictments both under the Prompt Disposition Rules and under Rule 48(b), F. R. Crim. P. Since petitioner believed that there was a clear violation of the Prompt Disposition Rules, it was unnecessary for him to rule on the Rule 48(b) issue and he declined to do so. The court below held that petitioner's failure to rule under the Rule 48(b) motions did not preclude mandamus "since we feel that the Rule 48(b) motions should have been denied. . . ." 481 F.2d at 237. This ruling is perhaps more egregious than the ruling on the Prompt Disposition Rules.

It had already been settled in the Second Circuit that the dismissal of the indictment under Rule 48(b) is a discretionary act not reviewable by appeal or mandamus. *United States* v. *DiStefano, supra.* The court below apparently believed that petitioner would dismiss under Rule 48(b) if the matter were remanded to him. Accordingly it acted most improperly and far beyond the scope of its authority by depriving petitioner of the opportunity to rule on this issue.

4. THE DECISION BELOW MISINTERPRETED THE PROMPT DISPOSITION RULES, IMPROPERLY REJECTED PETITIONER'S FACTUAL FINDINGS, IGNORED AND/OR MISSTATED MATERIAL FACTS, AND ADOPTED STANDARDS OF PREJUDICE FOR DISMISSAL UNDER RULE 48(b), F. R. CRIM. P., CONTRARY TO THOSE ENUNCIATED BY THIS COURT.

a. Under Rule 5(e) of the Prompt Disposition Rules the government would have an additional "reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and there is good cause for not granting a severance".* The government attempted unilaterally, without notice to defendants or approval of petitioner, to avail itself of Rule 5(e) by contending that Mintz was a "fugitive", simply because he apparently elected to continue living abroad as he had done for the ten years which preceded his indictment. The question of whether Mintz was a fugitive was irrelevant. Rule 5(d) would extend the government's time as to Mintz only if he were "absent" or "unavailable" as defined therein. Both of these terms required the government to show that it had exercised "due diligence" either to locate Mintz or to return him for trial. The government represented to petitioner that despite due diligence it had been unable, since his indictment, to "ascertain his whereabouts" (A 98).** This was a deplorable misrepresentation. Defendants demonstrated, by reference to the government's own papers and the deposition of Penn, its principal witness, that the government

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* The rule further states: "In all other cases the defendant should be granted a severance so that he may be tried within the [6 months] time limits applicable to his case."

** References in the form "A " are to the appendix in the court below. References in the form "CA " are to the appendix to this petition.

had been in direct personal contact with Mintz before, and for at least eight months after, the indictments were filed. Accordingly, petitioner found, rather gently in light of the government's misrepresentation, that the government's delay as to the defendants was unreasonable. Petitioner implicitly found that Mintz was neither "absent" nor "unavailable", as those terms are used in Rule 5(d), stating:

> "No facts have been presented to reveal how diligently or earnestly Mintz is being sought or with what likelihood of discovery, arrest or expedition." (CA5).

In granting mandamus the court below, without any justification and contrary to the well-settled law, necessarily set aside petitioner's factual determination on this essential point. *SEC* v. *Chenery Corp.*, 318 U.S. 80, 88 (1943).

b. The court below rested its opinion upon its erroneous finding that the government "was able and willing to proceed with the trials forthwith." 481 F.2d at 232 and 234. The government never stated that it was ready for trial, but merely that it "has never indicated an unwillingness to go to trial." (A 267).* In light of the fact that the Prompt Disposition Rules obviously required the government to announce its readiness, petitioner properly characterized the prosecutor's above quoted statement as "beside the point". (CA 6).

c. The court below, without a hearing and without any ruling by petitioner, rejected as "insubstantial" de-

* The government's conduct throughout this case has been less than exemplary. Only yesterday it moved to dismiss one of its civil actions (United States v. Carr et al., Civil Action No. 3-5015-B, N.D. Tex.) rather than comply with the order of District Judge Sarah T. Hughes directing it to answer the written interrogatories of Mr. Carr, one of the criminal defendants herein. The government is thus continuing, callously and improperly, to use its vast resources to bring additional pressure to bear upon these defendants and inhibit their ability to prepare for trial in any meaningful manner.

fendants' grounds for dismissal under Rule 48(b). F. R. Crim. P., and held that petitioner could not properly have granted relief under that rule. In reaching this result the court below: (i) failed to set forth accurately and fully the facts raised by defendants, and (ii) applied erroneous legal standards.

In enumerating the elements of prejudice suffered by petitioners because of the government's delay, the opinion below overlooked several crucial allegations. The major strategy of the defense would have been to establish from the records of the PX that purchases made by defendants did not favor manufacturers represented by Penn and Mintz and that such merchandise was not only the highest quality name brand, but that it was within the prices agreed to by the PX and that it was regularly saleable. The moving papers in the district court demonstrated that the documents necessary for the preparation of this defense had not been retained by the PX due to the lapse of time, as petitioner pointed out (CA 2). The opinion below additionally overlooked the fact that defendants had alleged that they suffered greatly in their employment, being denied promotions. Mr. Carone was forced out of business and denied permission to take a real estate salesman's license examination because of the mere pendency of the indictments. The court below apparently rejected as "insubstantial" the foregoing claims, as well as defendants' assertions that they had suffered emotional stress from the long delay, 481 F.2d at 237.

This Court's recent evaluation of the factors necessary to relief under Rule 48(b) differed sharply from that in the opinion below. In *Strunk* v. *United States,*—U. S.—37 L.Ed. 2d 56, 61 (1973) this Court stated:

> "The speedy trial guarantee recognizes that a prolonged delay may subject the accused to an emotional

stress that can be presumed to result in the ordinary person from uncertainties in the prospect of facing public trial . . . ."

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and the opinion of the Second Circuit.

Respectfully submitted,

MAX WILD
Rubin Wachtel Baum & Levin
598 Madison Avenue
New York, N. Y. 10022

GREGORY J. PERRIN
30 Vesey Street
New York, N. Y. 10007

November 8, 1973.

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Plaintiff,

70 Cr. 126.

—against—

RAYMOND F. CARR and FRITZ CLAUDIUS MINTZ,
Defendants.

WHITNEY N. SEYMOUR, JR., ESQ.
United States Attorney
United States Court House
New York, New York 10007
RICHARD BEN-VENISTE, ESQ.
Assistant United States Attorney

GREGORY J. PERRIN, ESQ.
30 Vesey Street
New York, New York 10007
Attorney for defendant Carr

UNITED STATES OF AMERICA,
Plaintiff,

70 Cr. 127.

—against—

DOROTHY LUBKERT SHEA and FRITZ CLAUDIUS MINTZ,
Defendants.

WHITNEY N. SEYMOUR, JR., ESQ.
United States Attorney
New York, New York 10007
RICHARD BEN-VENISTE, ESQ.
Assistant United States Attorney

ROBERT E. GOLDMAN, ESQ.
122 East 42nd Street
New York, New York 10017
Attorney for defendant Shea

LASKER, D. J.

Seven defendants in related cases moved to dismiss the indictments against them under Rule 4 of the Second Circuit Rules Regarding Prompt Disposition of Criminal Cases, Rule 48 of the Federal Rules of Criminal Procedure and the Sixth Amendment. They rely primarily on the Second Circuit Rule. The parties have heretofore been advised that the motions were granted and that an opinion would be filed stating the court's reasons.

The indictments in each case date from early 1970. They allege conspiracies beginning between 1960 and 1966 with overt acts falling between 1965 and 1967. Each of the indictments alleges a conspiracy to defraud the United States, 18 U.S.C. §371, by a scheme of bribes and kick-backs in supplying the Army and Air Force Exchange Service, the Post Exchange facilities ("PX"). Each case involves two defendants, the second in each being one Fritz Claudius Mintz who appears to have offered the bribes. The other defendant is alleged to have received the bribes. Mintz has been a fugitive since the filing of the indictments on February 25, 1970, and the remaining defendants have moved to dismiss the indictments against them.

In support of their motions, the defendants assert prejudice of several kinds: The dulling of witnesses memory caused by passage of time, (in this regard, defendants' prior Rule 48 motion was denied without prejudice to renewal on trial); inability to secure the records relevant to the dealings each defendant had with Mintz (see e.g., Carr, Affidavit of Gregory J. Perrin, sworn to May 1, 1972); character witnesses of one defendant have died (see e.g., Bisgyer, Affidavit of Philip Vitello, sworn to March 16, 1972). Defendants also urge that the

lack of a speedy trial has denied them an opportunity to vindicate themselves and in the interim with the cloud of the accusations over them they have lost jobs, been denied promotions and have been unable to clear their names.

Because we base our decision on Rule 4, we need not consider whether these factors would also justify dismissal under Rule 48 of the Federal Rules of Criminal Procedure. They are relevant, however, in determining whether discretion should be exercised to permit delay beyond the six month limit provided in Rule 5.

Rule 4 states a mandate.

> "In all cases the government must be ready for trial within six months from the date of arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is the earliest. If the government is not ready for trial within such time, or within the periods as extended by the district court for good cause, . . . then, upon application of the defendant or upon motion of the district court, after opportunity for argument, the charge will be dismissed."

The provisions of Rule 4 must be read with those of Rule 5 which states:

> "In computing the time within which the government should be ready for trial under Rules 3 and 4, the following period should be excluded . . . (e) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and there is good cause for not granting a severance." [1]

These are the facts: Investigation of alleged fraudulent practices in the PX facilities in Europe began in 1966. One of the alleged coconspirators Morton Penn, cooperated with the government in late 1969 and testified before the Grand Jury on February 24, 1970. The indictments were returned the next day.

The indictments allege criminal acts in the following years:

Carr, 1965 and 1966; Shea, 1965 and twice in 1966; Munns, 1965 and 1966; Bisgyer, 1965 and 1966; Roemer, twice in 1965; Ferguson, 1965 and 1966, Carone, 1965, 1966 and 1967. Motions by defendants in early April of 1970 seeking dismissal under Rule 48 and the Sixth Amendment were denied at that time "without prejudice to be renewed at trial." (Unpublished Opinion filed under 70 Cr. 126, June 1, 1970, Murphy, D.J.).

On January 5, 1971, the six month rule of the Second Circuit was promulgated and became effective July 5, 1971. Previously all these cases had been transferred and consolidated before us by order of the Chief Judge. No notice of readiness or other communication was received by the court during the six months after July 5, 1971. No application for extension of time as provided under Rule 5 was made by the United States Attorney.

On February 2, 1972, the court held an ex parte conference with the Assistant United States Attorney assigned to these cases in order to determine the status of the cases. The court noted that no application for an exception to Rule 4 has been sought and inquired why the cases were listed as "Rule 5(e) exception" in the "Monthly Case Report" prepared by the United States Attorney in compliance with Rule 2 of the same Second Circuit Rules. The court noted its obligation to rule upon

the reasonableness of any delay beyond the sixth month. The government stated that the continued delay was because Mintz remained a fugitive and the government sought economies of court and government time by trying Mintz with the other defendants. The court asked that the government notify defendants of this reason for delay.

Complying with the court's request, on March 10, 1972, the government addressed a letter to each defense counsel informing him that because Mintz was a fugitive, the government "has not moved for a certain trial date in the anticipation that we will be able to secure Mintz' appearance and thereby eliminate the expenses and inconveniences of multiple trials."

The instant motions followed and were filed during the latter part of March and April. Argument on the Shea and Bisgyer motions was held at a conference on April 13, 1972. On May 10, 1972, the court directed that the government answer all the remaining outstanding defense contentions. The government's papers were filed on May 17, 1972, and raised no new or different contentions or facts, but alleged its readiness to go to trial against the moving defendants.

In support of its argument that the delay while seeking Mintz is reasonable, the government has stated that Mintz is in Europe and is wanted in Germany, Spain and Switzerland. When found, extradition is planned. No facts have been presented to reveal how diligently or earnestly Mintz is being sought or with what likelihood of discovery, arrest or extradition. He was in Europe at the time the indictments came down, was notified of them and refused to return to the United States. Despite a search of some two and one-half years, Mintz remains unapprehended and his whereabouts are apparently unknown.

An extended search for one defendant without reasonable hope at any time of apprehending him offers no justification under the rule for the delayed trial of another defendant. To say either that the government "has never indicated an unwillingness to go to trial" or that it is now ready to proceed against the remaining defendants is beside the point. It was the government that, unilaterally and without application, listed the series of cases involving Mintz as an exception to Rule 4. It was the government that pressed delay in hopes that Mintz would be caught. The government's determination in its "Monthly Case Report" cannot be deemed to have been accepted or acquiesced in *sub silentio* by the court. To the contrary, it is the court which raised the question as to why the cases were listed as exceptions under the rule, and whether there was justification for such listing. The burden is on the government to either press for trial or demonstrate that an exception to the six month rule has merit.

By the time the court called on the government to justify its delay, thirteen months had passed since the promulgation of the Rule, and seven months since its effectiveness, without action by the government. Even today, we have not been advised that there is any hope of apprehending Mintz. Surely this set of facts undermines the government's contention that it was justified in the first instance in unilaterally designating the case as falling within an exception to the rule on the theory that Mintz would soon be found and extradited.

Even if the government had formally applied for a "reasonable period of delay" under Rule 5(e), or a continuance under 5(c), or pressed exceptional circumstances under 5(h), we do not believe the period could extend beyond a very few months at most, and then only

with the real likelihood that Mintz would be apprehended. The delay here *without* securing Mintz' presence demonstrates its unreasonableness.

Nor would delaying the severance of Mintz have achieved the economies of court time which the government has pressed. To be sure there is the possibility that were he convicted in one case he might cooperate with the government in the others, but then again he might not. Even if he were to cooperate, barring unexpected changes in defendants' pleas, seven separate trials would still have to be held.

Unlike motions under Rule 48 or the Sixth Amendment, where issues such as the length and reason for the delay, prejudice the defendant and his possible waiver must be explored, Rule 4 motions focus on the obligations of the government recognizing, as the Supreme Court commented in *Barker* v. *Wingo,* 407 U.S. 514, 519, (1972), that, ". . . there is a societal interest in providing a speedy trial which exists separate from and at times in opposition to the interests of the accused."

The rule cast in positive terms. The district court must dismiss the charges unless the government successfully sustains its burden of demonstrating the priority of a Rule 5 exception. As the Court of Appeals noted in its "Statement" accompanying the Prompt Disposition Rules:

> "The public interest requires disposition of criminal charges with all reasonable dispatch. The deterrence of crime by prompt prosecution of charges is frustrated whenever there is a delay in the disposition of a case which is not required for some good reason. The general observance of law rests largely upon a respect for the process of law enforcement. When the

process is slowed down by repeated delays in the disposition of charges for which there is no good reason, public confidence is seriously eroded."

For the reasons stated, defendants' motions to dismiss the indictments are granted.

It is so ordered.

MORRIS E. LASKER
U.S.D.J.

Dated: New York, New York
December 5th, 1972.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-746

HONORABLE MORRIS E. LASKER,

UNITED STATES DISTRICT JUDGE FOR
THE SOUTHERN DISTRICT OF NEW YORK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MAX WILD
RUBIN WACHTEL BAUM & LEVIN
598 Madison Avenue
New York, N. Y. 10022

GREGORY J. PERRIN
30 Vesey Street
New York, N. Y. 10007

November 8, 1973

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 692-8—September Term, 1972.

(Argued March 7, 1973 Decided June 11, 1973.)

Docket No. 73-1370
Docket Nos. 73-1102 through
73-1108

UNITED STATES OF AMERICA,

Petitioner,

—v—

MORRIS E. LASKER, United States District Judge
for the Southern District of New York,

Respondent.

UNITED STATES OF AMERICA,

Appellant,

—v—

RAYMOND F. CARR,

Appellee.

UNITED STATES OF AMERICA,

Appellant,

—v—

DOROTHY LUBKERT SHEA,

Appellee.

UNITED STATES OF AMERICA,
Appellant,

—v—

LAMONT H. MUNNS,
Appellee.

UNITED STATES OF AMERICA,
Appellant,

—v—

MELVILLE L. BISGYER,
Appellee.

UNITED STATES OF AMERICA,
Appellant,

—v—

MARTIN L. ROEMER,
Appellee.

UNITED STATES OF AMERICA,
Appellant,

—v—

ALBERT FERGUSON,
Appellee.

UNITED STATES OF AMERICA,
Appellant,

—v—

DONALD F. CARONE,
Appellee.

Before:

LUMBARD and TIMBERS, *Circuit Judges*, and
WYZANSKI, *District Judge.**

Appeal from an order of the Southern District (Lasker, *J.*) dismissing seven criminal indictments under this Circuit's Rules Regarding Prompt Disposition of Criminal Cases, and petition for mandamus instructing the district judge to reinstate the indictments.

Appeal dismissed; petition for mandamus granted.

JOHN W. NIELDS, JR., Assistant United States Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, on the brief), *for Appellant.*

GREGORY J. PERRIN, New York, N.Y., *for Appellees Carr and Ferguson.*

MAX WILD, New York, N.Y. (Rubin Wachtel Baum & Levin, on the brief), *for Appellee Carone.*

PETER LUSHING, New York, N.Y. (Robert E. Goldman, on the brief), *for Appellee Shea.*

HENRY J. BOITEL, New York, N.Y. (Philip Vitello, on the brief), *for Appellee Bisgyer.*

JACK S. HOFFINGER, New York, N.Y., *for Appellee Roemer.*

* Senior District Judge of the District of Massachusetts, sitting by designation.

LUMBARD, *Circuit Judge:*

The government appeals from an order of the Southern District dismissing the indictments against the seven appellees, Carr, Shea, Munns, Bisgyer, Roemer, Ferguson, and Carone. Alternatively, the government has petitioned this court for mandamus ordering the district judge to reinstate the indictments. We dismiss the appeal for lack of jurisdiction and we grant the petition for mandamus.

In seven indictments handed up February 25, 1970, appellees were individually charged with having conspired with a co-defendant, Fritz Claudius Mintz, and an unindicted co-conspirator, Morton Penn, to defraud the United States, in violation of 18 U.S.C. § 371. The defendants were all employed as civilian buyers for European or American post exchanges. The indictments charged that the defendants conspired with Mintz and Penn, who represented certain American manufacturers, to receive substantial payments during the period from 1960 to 1967 in return for causing the post exchanges to purchase products offered by Mintz' and Penn's principals. Mintz was named as a co-defendant in each indictment.

All the indicted defendants-appellees pleaded not guilty to the indictment in which he or she was named. Mintz has not appeared; he is a fugitive who has been living in Europe since some time prior to the filing of the indictments.

In April 1970 each of the appellees moved pursuant to Rule 48(a), F.R.Crim.P., for dismissal on several grounds, one of which was pre-indictment delay. However, defendants-appellees at no time made a request for a trial date. The district court denied all motions for dismissal.

On January 5, 1971, the Second Circuit Judicial Council promulgated the Rules Regarding Prompt Disposition of Criminal Cases ("Prompt Disposition Rules"), which be-

came effective on July 5, 1971. After the Prompt Disposition Rules went into effect, the government listed the seven indictments on the monthly report of cases over six months old as an exception to the general six-month rule under Rule 5(e).

Ever since the filing of the indictments, the government has attempted to obtain Mintz' presence in the Southern District. However, he has remained in Europe and has refused to return. In June 1971, the government commenced proceedings to extradict Mintz from Spain. Either because Mintz has left Spain or because the Spanish authorities have been unable to locate him, the extradition proceedings have not been successful. Thus, the government's efforts to return Mintz to this country have proved fruitless.

In an *ex parte* meeting with the government's counsel in March 1972, the district judge insisted that the government notify the appellees of the basis for these cases being carried as Rule 5(e) exceptions, which the government did by letter on March 10, 1972. Shortly thereafter, the defendants each moved to dismiss the indictments under Rule 4 of the Prompt Disposition Rules, as well as under Rule 48(b), F.R.Crim.P. The government indicated that, if the district judge concluded that it was not reasonable to wait any longer for Mintz, it was able and willing to proceed with the trials forthwith. On December 5, 1972, the district judge dismissed the indictments under Rule 4 of our Prompt Disposition Rules.[1] Thereupon, the govern-

1 The Second Circuit's Rules Regarding the Prompt Disposition of Criminal Cases were superseded, effective April 1, 1973, by Plans for Achieving Prompt Disposition of Criminal Cases for each of the six districts in the circuit. These Plans were adopted in accordance with Rule 50(b), F.R.Crim.P. The Prompt Disposition Rules that are relevant to this decision remain unchanged in the Plans of each of the districts. Therefore, although this case is governed by the prior Prompt Disposition Rules, the decision bears also on the proper interpretation of the District Plans.

ment took this appeal and brought the instant petition for mandamus.

Initially, we must agree with appellees' contention that this court is without appellate jurisdiction to review the order of the district court. Although as presently structured 18 U.S.C. § 3731, which governs this court's jurisdiction of criminal appeals brought by the government, would clearly give this court jurisdiction to review the district court's order on appeal, the statute applicable to this appeal is § 3731 as it was phrased prior to its amendment by § 14(a) of the Omnibus Crime Control Act, 84 Stat. 1890 (1970). For reasons set forth in Part I of Chief Judge Friendly's opinion in *United States* v. *Di-Stefano,* 464 F.2d 845 (2d Cir. 1972), § 3731 does not give this court jurisdiction to review on appeal the district court's dismissal of these indictments. Accordingly, we dismiss the government's appeals.

Turning to the petition for mandamus, we must acknowledge at the outset that mandamus will not issue merely as a substitute for ordinary appellate review. Mandamus is only available in extraordinary cases, where the action of the lower court amounts to a usurpation of power or a gross abuse of discretion. Mandamus cannot "be availed of to correct a mere error" of the district court. *De Beers Consolidated Mines, Ltd.* v. *United States,* 325 U.S. 212, 217 (1945). Thus, we must determine whether any error of the district court is of sufficient magnitude to justify the issuance of mandamus.

The issue presently before us involves the proper application of Rules 4 and 5(e) of the Prompt Disposition Rules. Rule 4 provides that:

> In all cases the government must be ready for trial within six months from the date of the arrest, service of summons, detention, or the filing of a complaint or

> of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest. If the government is not ready for trial within such time, or within the periods as extended by the district court for good cause, then upon application of the defendant or upon motion of the district court, after opportunity for argument, the charge shall be dismissed.

Rule 5(e) states that:

> In computing the time within which the government should be ready for trial, the following periods should be excluded:
>
> . . .
>
> (e) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and there is good cause for not granting a severance. In all other cases the defendant should be granted a severance so that he may be tried within the time limits applicable to his case.

Here the threshold question under Rules 4 and 5(e) is whether the Prompt Disposition Rules require the government to apply to the district court for "a reasonable period of delay" under 5(e) beyond, and before the expiration of, the six-month period otherwise applicable under Rule 4. Two other questions are 1) how the 5(e) "reasonable period of delay" is to be determined and applied, and 2) who shall have the burden of moving for the severance contemplated by Rule 5(e) "in all other cases." This case demonstrates the significance of these questions, in that, if the government is not required to apply for a 5(e) "reasonable period of delay" before the end of the ordinary

six-month period and if neither the defendant nor the court seeks a severance, there is considerable danger that the government will be "mouse-trapped" by the defendant moving for a Rule 4 dismissal some time after the six-month period and by the court retroactively determining that the period during which the government has delayed under Rule 5(e) was unreasonable. In the cases involved here, this series of events resulted in the mass dismissal of seven conspiracy indictments.

The Rules were not intended to operate in this fashion. In light of *United States* v. *Rollins*, sl.op. 2279 (March 13, 1973), it now seems clear that it was not necessary for the government to apply for an extension of the six-month period under Rule 5(e) before the end of the six month calendar period. Indeed, the phraseology of Rule 5 would seem to militate against any other result; for that rule clearly provides that "[i]n computing the time within which the government should be ready for trial," certain listed periods of time "should be excluded." Thus, it seems that one cannot sensibly talk about the six-month period having run or not without making initial reference to the excluded periods under Rule 5. As a result, it would involve strained logic to say that applications for exclusions under Rule 5 must be made to the district court before the elapse of the six-month period, since by definition any Rule 5 excluded period is not to be included in calculating the six-month period. Accordingly, we hold that, as indicated in *Rollins* it was not necessary for the government to apply for a Rule 5(e) exclusion before the expiration of the six-month calendar period.

A more difficult problem involves the proper course of action for the district court when it decides that the period of delay contended for by the government is unreasonable. The rule itself provides some guidance for this situation when it indicates that "[i]n all other cases, the defendant

should be granted a severance so that he may be tried within the time limits applicable to his case." In determining the proper operation of Rule 5, it is important to remember that the primary purpose of the Prompt Disposition Rules was to vindicate the strong public interest in the prompt resolution of criminal prosecutions. It was the intent of the Circuit Council to stimulate the district courts and counsel to resolve criminal cases expeditiously. It was not the Council's aim to make the government vulnerable to dismissal of an indictment where a co-defendant is a fugitive from justice and the government, with some reason, delays action against defendants who are present.

Defendants argue for a literal and technical application of the first sentence of Rule 5(e). In essence, they contend that, even if a defendant is joined for trial with a codefendant as to whom the Rule 4 period has not run, if the court determines that the amount of delay that has elapsed up to the time the dismissal motion is made is unreasonable, then Rule 5(e) will not permit any period of time to be excluded in determining the Rule 4 period. On the other hand, the government argues that the first and second sentences of Rule 5(e) must be interpreted together. The essence of the government's position is that whenever the district court is presented with a question of the propriety of a Rule 5(e) exclusion, it should proceed as follows: 1) determine whether the defendant is joined with a codefendant as to whom the Rule 4 period has not run; 2) if the first requisite is met, determine whether any further delay would be unreasonable under the circumstances —not determine retroactively whether the previous delay was unreasonable; and 3) determine whether, independently of the reasonableness of future delay, there is good cause for a severance. If the court determines either that further delay would be unreasonable or that there is good cause for a severance, the government contends it should

then sever the defendant's case so that defendant's Rule 4 period would henceforth run independently of his codefendant.

We think that the approach suggested by the government is more nearly consistent with the purpose of the Prompt Disposition Rules than is that urged by the defendants. Especially in light of the fact that the Prompt Disposition Rules do not require the government to seek the court's approval prior to the running of the six-month calendar period, interpreting Rule 5(e) in the manner defendants contend would interpose an unnecessary hazard in the way of the government's prosecution of criminal cases without any concomitant promotion of the public interest. Therefore, we conclude that the district court was in error when it dismissed the instant indictments. Rather, it should have found that, under the circumstances of Mintz' likely continued unavailability, any further delay under the auspices of Rule 5(e) would have been unreasonable, and thus should have severed Mintz from each defendant's indictment so that trial could proceed forthwith, as the government assured the court it was prepared to do. This would have given appropriate weight to both sentences of Rule 5(e) and would have adequately vindicated the public interest in the prompt resolution of criminal charges.

The defendants argue that such a result does not comport with Rule 8 of the Prompt Disposition Rules, which states, in pertinent part, that "[a] demand by a defendant is not necessary for the purpose of invoking the rights conferred by these rules." We do not agree. The point that Rule 8 emphasizes is that it is not necessary for a defendant to demand a trial date in order to bring the Prompt Disposition Rules into operation. Rule 8 was not intended to place all the burdens of administering the Prompt Disposition Rules on the government. On the con-

trary, the prime responsibility for enforcing the Rules, as well as for drafting them (See Rule 50(b), F.R.Cr.P.), is placed on the district court. This is necessarily so because the main interest to be served by the rules is the public interest, and not the interest of one or both of the parties. Moreover, in the case of Rule 5(e), it would be unrealistic to expect the government to take the initiative to move for a severance, since in the natural course of events, the government would likely argue that the period of delay is reasonable and that there is no good cause for a severance.

The Circuit Council must have expected either that the defendant would seek a severance or that the court would so proceed on its own motion. This is the logical fashion in which one would expect the second sentence of Rule 5(e) to be effectuated. And we see no reason under the policy of the Prompt Disposition Rules to dismiss an indictment merely because neither the defendant nor the district judge took the initiative in requesting or ordering a severance. Therefore, we do not see Rule 8 as precluding the interpretation that we give to Rule 5(e).

Of course, that the district court might have been in error in dismissing the indictments is alone not sufficient to justify the issuance of mandamus. Mandamus "is meant to be used only in the exceptional case where there is clear abuse of discretion or 'usurpation of judicial power.'" *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249, 257 (1957), citing *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 383 (1953). It is argued that the district judge had unquestioned power or jurisdiction to dismiss the indictments and that, therefore, this is an appropriate case for mandamus. However, we do not believe that the propriety of mandamus depends on whether the asserted error is labeled as an exercise of non-existent power or merely as an abuse of discretion. The important considerations, in the final analysis, are the gravity of the issue involved and

the necessity that the reviewing judges see for corrective action.

In recent years, the Supreme Court has held that the courts of appeals have the power to issue mandamus in certain instances in support of their supervisory authority over the district courts of the circuit. In *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249, 256, 260 (1957), the Court, quoting from *Los Angeles Brush Corp.* v. *James*, 272 U.S. 701, 706 (1927), said:

> "Where the subject concerns the enforcement of the . . . [r]ules which by law it is the duty of this Court to formulate and put into force," mandamus should issue to prevent such action thereunder so palpably improper as to place it beyond the scope of the rule invoked.
>
> . . .
>
> We believe that supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system. The All Writs Act confers on the Courts of Appeals the discretionary power to issue writs of mandamus in the exceptional circumstances existing here."

See also, *Schlagenhauf* v. *Holden*, 379 U.S. 104 (1964). We think that this is a particularly appropriate case for our exercise of our supervisory authority by means of mandamus. The most important factor in this regard is that, in dismissing the indictments, respondent purported to apply rules promulgated by the judges of this court acting as a circuit council and, in so doing, interpreted those rules in a fashion that subverts the policies they were designed to serve. Having given the district courts a weapon by which to dismiss indictments, we have the power through mandamus to see that it is not wielded in a manner that

subverts or ignores the interests that were intended to be served.

The issue in this case involves the proper interpretation to be given to our Prompt Disposition Rules. We have found that the district judge interpreted the Rules in a fashion that does violence to the policies that the Rules were intended to promote, without any offsetting benefit to the public interest. The result was a wholesale dismissal of seven indictments of government officials alleged to have conspired to receive bribes to influence their official conduct. There is a compelling public interest in the determination on the merits of charges of corrupt and illegal practices by those acting as government officers. In light of these factors, we conclude that corrective action is necessary within our supervisory authority over the district courts.[2]

Respondent argues that this is not a proper case for the issuance of mandamus in support of our supervisory authority because, if such a dismissal recurs in later cases, the government will have the statutory right of direct appeal to this court.[3] Therefore, respondent contends that mandamus is unnecessary to the effectuation of our supervisory authority. We do not agree. This is the first case that has come before this court in which the district court has interpreted the rules in question. Although we may

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2 In any event, as we have determined that the Prompt Disposition Rules should be interpreted, the Rule 4 period had not yet run at the time respondent dismissed the indictments. Therefore, even under a power analysis, it is clear that respondent was without power under Rule 4 to dismiss the indictments, and mandamus would be proper. See *Hilbert* v. *Dooling*, slop. 2191 (March 12, 1973).

3 This court's appellate jurisdiction in any subsequent dismissals under the District Plans for Achieving Prompt Disposition of Criminal Cases will be governed by 18 U.S.C. § 3731 as amended by the Omnibus Crime Control Act, 84 Stat. 1890 (1970), which unquestionably gives this court appellate jurisdiction over such a dismissal. As noted earlier, this case is governed by § 3731 prior to its amendment.

later have similar cases under the new rules, which we can examine on appeal, this does not eliminate the uncertainty that the shadow of the district court's decision may throw over the conduct of the United States Attorney and the delay in the prosecution of future indictments pending appeals from dismissals such as that before us here.[4] It is the business of this court to prevent such potential disruption of the orderly administration of criminal justice in this circuit whenever it can; indeed, the very rules involved here were promulgated with that end in mind. Therefore, we conclude that this is an appropriate case for the issuance of mandamus to effectuate this court's suprevisory authority.

Nothing in the decision of *Will* v. *United States,* 389 U.S. 90 (1967), prevents our issuance of mandamus in this case. The Court's decision in *Will* reversing the Seventh Circuit's grant of mandamus was based at least in part on the fact that the writ issued without any written opinion stating the reasons therefor. As the Court said:

> Mandamus is not a punitive remedy. The entire thrust of the Government's justification for mandamus in this case, moreover, is that the writ serves a vital corrective and didactic function. While these aims lay at the core of this Court's decisions in *LaBuy* and [*Schlagenhauf*], we fail to see how they can be served here without findings of fact by the issuing court and some statement of the court's legal reasoning. 389 at U.S. at 107.

See *United States* v. *Griesa,* —— F.2d ——, —— (2d Cir. 1973), slip op. 3319, at 3322 (May 4, 1973). This "corrective and didactic function" that the Court seemed to

4 Although the Prompt Disposition Rules have been rescinded, they are paralleled by their offspring, the District Plans, which took effect April 1, 1973. See Note 1, *supra.*

recognize assumes a special significance when the question involves the application of a rule promulgated by the issuing court.

The Court's reference to *LaBuy* and *Schlagenhauf* would indicate that *Will* did not retreat from these earlier decisions. Respondent argues that *Will* means that the use of mandamus in support of the court's supervisory power, which was recognized in *LaBuy* and *Schlagenhauf,* is limited to civil cases. Indeed, the Court did seem to indicate that it did not find the necessary extraordinary circumstances to justify mandamus in a criminal case. After enumerating several situations where the writ had issued and where it had not, the Court said:

> But this Court has never approved the use of the writ to review an interlocutory procedural order in a criminal case which did not have the effect of a dismissal. We need not decide under what circumstances, if any, such a use of mandamus would be appropriate. It is enough to note that we approach the decision in this case with an awareness of the constitutional precepts that a man is entitled to a speedy trial and that he may not be placed twice in jeopardy for the same offense. 389 U.S. at 98.

In this case, of course, we are dealing with a dismissal and neither of the constitutional precepts noted by the Court is in any way jeopardized by our issuance of mandamus. Thus, we find that *Will* presents no obstacle to the writ's issuance here.

Finally, respondent argues that, even if it is proper for the writ to issue on the question of the dismissal under Rule 4 of the Prompt Disposition Rules, the writ should not issue here because the dismissal was proper in any event on the motion to dismiss under Rule 48(b) of the

Federal Rules of Criminal Procedure, on which the district judge did not rule. However, since we feel that the Rule 48(b) motion should have been denied, this is no obstacle to mandamus.

In *Barker* v. *Wingo*, 407 U.S. 514 (1972), the Court laid down a balancing test to determine whether a particular delay had violated the defendant's right to a speedy trial. The Court listed four factors that should be considered in striking the balance: the length of delay, the reason for the delay, whether defendant has demanded a speedy trial, and prejudice to the defendant. The Court further indicated that these factors were interrelated and that no one was "either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial." We feel that the balance in this case must be struck in the government's favor. The delay here from the time of indictment to the making of the motions was slightly more than two years. This is far less than that involved in *Barker*, where the Court found no deprivation of the right. This delay is mitigated by the reason for the delay, the government's desire to secure the presence of Mintz and to try him jointly with each of his alleged co-conspirators, which would have obviated the inconvenience of a separate trial for Mintz.

In addition, there is the fact that none of the defendants asserted his speedy trial rights. Although this factor is not conclusive, the Supreme Court indicated that it is entitled to great weight:

> Whether and how a defendant asserts his right is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that

> he experiences. The more serious the deprivation, the more likely is the defendant to complain. The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial. 407 U.S. at 531-32.

Finally, we must look to any prejudice suffered by the defendants. For the most part, defendants have asserted general claims of prejudice, such as damage to reputation while the indictments have been pending and the dulling of witnesses' memories. However, we find these claims to be relatively insubstantial in light of defendants' failure to demand a trial date. This seems to be the import of the language noted above from *Barker* v. *Wingo*. The fact that defendants did not assert their right to a speedy trial during the period of the delay is strong evidence that these general claims of prejudice are not substantial. In addition, defendant Bisgyer claims prejudice because two witnesses whom he had intended to call to testify about his character died during the period of the delay. The first of these witnesses died five months after the indictment was rendered, and the second died eleven months after the indictment. However, here again there was no complaint from Bisgyer about the delay until 24 months after the indictment. And there is conspicuously absent any allegation that Bisgyer is now unable to secure other character witnesses. Therefore, we conclude that this claim of prejudice is also insubstantial.

On balance, therefore, we find that there has been no violation of defendant's right to a speedy trial and that the Rule 48(b) motion would have had to be denied. Thus, it is appropriate for this court to issue mandamus di-

recting the district judge to reinstate the indictments that he dismissed in reliance on the Prompt Disposition Rules.

Accordingly, the government's appeal is dismissed and its petition for mandamus is granted. The writ shall issue.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the tenth day of August, one thousand nine hundred and seventy-three.

Present:

HON. J. EDWARD LUMBARD,

HON. WILLIAM H. TIMBERS,

HON. CHARLES EDWARD WYZANSKI,
District Judge

United States of America,

Petitioner

-v- 73-1370

Hon. Morris E. Lasker, United States District Judge for the Southern District of New York,

Respondent

A petition for a rehearing having been filed herein by counsel for appellees Raymond F. Carr, Albert Ferguson and Donald F. Carone,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO,
Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the tenth day of August, one thousand nine hundred and seventy-three.

United States of America,

Petitioner

-v- 73-1370

Hon. Morris E. Lasker, United States District Judge, for the Southern District of New York,

Respondent

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for appellees Raymond F. Carr, Albert Ferguson and Donald F. Carone, and no active judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO,
Clerk

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No. 73-746

In the Supreme Court of the United States

OCTOBER TERM, 1973

HONORABLE MORRIS E. LASKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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HONORABLE MORRIS E. LASKER, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The principal issue presented here is whether the court of appeals properly issued a writ of mandamus to compel the district court to reinstate an indictment it had erroneously dismissed under an incorrect interpretation of procedural rules promulgated by the court of appeals.

On February 25, 1970, a grand jury empanelled in the United States District Court for the Southern District of New York indicted seven persons for conspiracy to defraud the United States. The charge arose out of a kickback conspiracy between civilian buyers for European and American post exchanges and two representatives of American manufacturers, in violation

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of 18 U.S.C. 371. The indictments charged that Morton Penn and Fritz Claudius Mintz had made substantial payments to seven civilian buyer defendants from 1960–1967, in return for which the buyers caused the post exchange to buy products offered by Mintz's and Penn's clients. Each of the defendants pleaded not guilty except for defendant Mintz, who was a fugitive living in Europe. In April 1970, the defendants moved for dismissal of the indictments pursuant to Rule 48(b), Fed. R. Crim. P., on several grounds, including pre-indictment delay. No request for a trial date was made then, nor was one made thereafter. The motion to dismiss the indictments was denied on June 1, 1970.

On January 5, 1971, the Second Circuit Judicial Council promulgated the Rules Regarding Prompt Disposition of Criminal Cases (28 U.S.C.A. [U.S. Courts of Appeals Rules] Supp., p. 65); the effective date of these Rules was postponed until July 5, 1971. In general the Rules required that the government be prepared to go to trial within six months of the return of the indictment, or the indictment would be dismissed (Rule 4); they further stated, however, that periods of delay resulting from certain necessary actions, such as an attempt to apprehend a co-defendant, would not be included in that six months (Rule 5e).[1] During the period following the date of the indictment, the government had been attempting to find co-defendant Mintz and

[1] The Second Circuit Rules Regarding Prompt Disposition of Criminal cases were promulgated by the Second Circuit pursuant to 28 U.S.C. 332. These rules have since been superseded by the adoption of individual plans for each district pursuant to Rule 50(b), Fed. R. Crim. P.

bring him to trial. Since Mintz refused to return from Europe voluntarily, proceedings to extradite him from Spain were begun, with Judge Lasker's authorization, in June 1971. This effort proved unsuccessful.

On July 1, 1971, the United States Attorney caused these indictments to be listed, on the monthly case report of cases over six months old, as a Rule 5e exception under the Prompt Disposition Rules, due to Mintz's continuing fugitive status. On March 10, 1972, at the district court's insistence, the United States Attorney sent a letter to the defendants informing them of the reasons for the case being carried as a Rule 5(e) exception. Each defendant then moved to dismiss the indictment for delay pursuant to Rule 4 of the Prompt Dispositions Rules and Rule 48(b), Fed. R. Crim. P. The defendants charged that the government was not making a strong effort to find Mintz and that the government was seeking the delay for tactical reasons. The United States Attorney responded that a good faith effort—which he was prepared to document—was being made to locate Mintz, and that the delay had not benefited the government but rather had worked to its disadvantage. The government asserted further that it would proceed to trial at any time set by the court.

Six and a half months later, the district court granted the motion and dismissed the indictment. In a short opinion the district court held that Rule 4 of the Prompt Disposition Rules required dismissal and that the Rule 5 exception did not apply. The dis-

trict court specifically declined to rule on the claim under Rule 48(b), Fed. R. Crim. P. (Pet. App. CA1–CA8).

The United States appealed to the court of appeals from the order of dismissal and also sought a writ of mandamus directing the district court to reinstate the indictments. The court of appeals held that under former 18 U.S.C. 3731 (which applied to this case), an appeal by the United States did not lie;[2] however, it granted the mandamus petition and issued the writ (Pet. App. CA9–CA26).

1. The Court has sanctioned the use of mandamus in exceptional cases in which the issue concerns interpretations of procedural rules in cases of first impression. *Los Angeles Brush Mfg. Corp* v. *James,* 272 U.S. 701; *Schlagenhauf* v. *Holder,* 379 U.S. 104, 110; *La Buy* v. *Howes Leather Co.,* 352 U.S. 249, 257, 260. Here the court of appeals, under its supervisory power, granted a writ of mandamus to compel the district court to reinstate the indictments it had dismissed on the basis of a mistaken interpretation of the Speedy Trial Rules promulgated by the Judicial Council of the Second Circuit. Since this was a case of first impression involving a construction of those rules, it was clearly proper for the court of appeals to use mandamus to insure that the Speedy Trial Rules are correctly applied. Moreover, as the court of appeals pointed out (Pet. App. CA21–CA22), although the Speedy Trial Rules were superseded by district plans

[2] Under the current version of 18 U.S.C. 3731 as amended by 84 Stat. 1890, which is applicable to criminal cases commenced after January 1971, a dismissal such as that in the instant case would be appealable.

subsequently adopted for the same purpose, the relevant portions of the new plans continue substantially unchanged the provisions of the Speedy Trial Rules which it was interpreting. Erroneous interpretation of those provisions by the district court could therefore lead to substantial disruption of the criminal justice system within the circuit until another case could be brought before the court of appeals. As the court of appeals correctly pointed out "[i]t is the business of this court to prevent such potential disruption of the orderly administration of criminal justice in this circuit whenever it can; indeed, the very rules involved here were promulgated with that end in mind" (Pet. App. CA22).

Contrary to petitioner's claim, the grant of the writ of mandamus in the instant case was not inconsistent with this Court's decision in *Will* v. *United States*, 389 U.S. 90. Unlike this case, the mandamus relief requested in *Will* was from an interlocutory decision of the district court concerning the scope of discovery.[3] Moreover, the Court there found that the gov-

[3] The court in *Will* emphasized that it was not ruling out the remedy of mandamus in cases such as this (389 U.S. at 97–98):

> This is not to say that mandamus may never be used to review procedural orders in criminal cases. It has been invoked successfully where the action of the trial court totally deprived the Government of its right to initiate a prosecution, *Ex parte United States*, 287 U.S. 241 (1932), and where the court overreached its judicial power to deny the Government the rightful fruits of a valid conviction, *Ex parte United States*, 242 U.S. 27 (1916). But this Court has never approved the use of the writ to review an interlocutory procedural order in a criminal case which did not have the effect of a dismissal.

ernment's factual premises were not supported by the record (*id.* at 100) and noted that the court of appeals granted mandamus without a reasoned exposition of the basis of its actions (*id.* at 107). Here, on the other hand, the factual premises with respect to the need for mandamus relief are supported by the record. The factual and legal analysis of the proper standards for implementing both the Rules and the successor Plans in the comprehensive opinion of the court of appeals are ample for the "vital corrective and didactic function" (*ibid.*) which the writ was intended to serve.

2. Petitioner's contention that there is a conflict among the courts of appeals on this issue is without substance. The cases he cites merely involved claims that the district court had abused its discretion.[4] They did not involve "the enforcement of the * * * [r]ules which by law it is the duty of this Court [or the Judicial Council] to formulate and put in force," in which instance mandamus is necessary to prevent action by the district court "so palpably im-

[4] In *United States* v. *Hester*, 325 F. 2d 654 (C.A. 9), cited by petitioner (Pet. 15), the court of appeals declined to issue the writ of mandamus after finding that "[i]n the light of all the factors considered by the trial court [judge]"—who ordered the case set for trial on a particular day and dismissed the indictment for failure to prosecute—"we cannot agree that there was the clear abuse of discretion" (325 F. 2d at 657). In *Thornton* v. *Corcoran*, 407 F. 2d 695 (C.A.D.C.), the court refused mandamus to compel a hospital to allow the defendant's attorney to sit in on a staff meeting involving a pre-indictment mental examination. In *Johnston* v. *Marsh*, 227 F. 2d 528 (C.A. 3), the court of appeals denied mandamus to force a district court to revoke the bail of a state prisoner.

proper as to place it beyond the scope of the rule invoked." *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 256. Where, however, remedial action of the kind sought in this case is necessary, there is substantial support for the view that mandamus is appropriate. See *United States* v. *Real*, 446 F. 2d 40 (C.A. 9); *United States* v. *Gray*, 448 F. 2d 164 (C.A. 9); *Hilbert* v. *Dooling*, 476 F. 2d 355 (C.A. 2), certiorari denied, October 9, 1973 (No. 72-1653); see also *United States Board of Parole* v. *Merhige*, 487 F. 2d 25 (C.A. 4).

Petitioner's related claim that there is a conflict within the Second Circuit ignores the distinction between cases in which mandamus was granted to enforce compliance with procedural rules (*Hilbert* v. *Dooling, supra; United States* v. *Weinstein*, 452 F. 2d 704, 715 (C.A. 2), certiorari denied *sub nom. Grunberger* v. *United States*, 406 U.S. 917) and cases in which it was denied where all that was alleged was an abuse of discretion. *United States* v. *DiStefano*, 464 F. 2d 845 (C.A. 2); *Securities and Exchange Commission* v. *Stewart*, 476 F. 2d 755 (C.A. 2); *United States* v. *Griesa*, 481 F. 2d 276 (C.A. 2). In any event, if there is some inconsistency in the various Second Circuit decisions, that inconsistency should be resolved by that court. *Wisniewski* v. *United States*, 353 U.S. 901, 902.[5]

4. Petitioner's final contentions concerning the proper interpertation of the Speedy Trial Rules and the standards for dismissal under Rule 48(b) were fully

[5] Significantly, no judge in active service in the court of appeals asked for a vote on the petition for rehearing *en banc* below (Pet. App. C.A. 28).

discussed and properly rejected by the court of appeals, on whose opinion we rely in this respect. The related claim (Pet. 18) that the court of appeals should not have reached the issue whether a dismissal was mandated under Rule 48(b) ignores the fact that this issue was reached in response to petitioner's alternative claim that "the writ should not issue here because the dismissal was proper * * * on the motion to dismiss under Rule 48(b) of the Federal Rules of Criminal Procedure." The court of appeals, however, correctly held that "since * * * the Rule 48(b) motion should have been denied, this is no obstacle to mandamus" (Pet. App. CA23–CA24).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1974.

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